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DIGEST OF OTHER RECENT VIRGINIA DECISIONS.**Supreme Court of Appeals.**

Note.—In this department we give the syllabus of every case decided by the Virginia Supreme Court of Appeals, except of such cases as are reported in full.

COX et al. *v.* HAGAN.

Sept. 17, 1919.

[100 S. E. 666.]

1. Bills and Notes (§ 371*)—Parol Evidence to Show Relationship of Principal and Surety.—While, as between themselves, parol evidence is admissible to show the actual relations to one another of apparent joint makers of a note, as that the relationship of surety in truth exists as to one or more of them, yet such evidence is admissible only against parties having knowledge of such relationship at the time they entered into the contract, and is not admissible against an innocent purchaser.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 475; 2 Va.-W. Va. Enc. Dig. 435.]

2. Pleading (§§ 142, 290 (3)*)—Failure to Verify or State Amount of Set-Off.—A plea not verified by affidavit and not alleging “the amount to which” defendant “is entitled, by reason of the matters contained in the plea,” as required by Code 1904, § 3299, relating to plea of set-off, is insufficient as against a general objection.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 287.]

3. Pleading (§ 8 (1)*)—Allegations of Plea of Conclusions of Law without Facts Insufficient.—A plea alleging mere conclusions of law, without alleging facts from which those conclusions are sought to be drawn, with sufficient detail and certainty to apprise plaintiff of the nature of the defense and to enable the court upon facts admitted or found to decide whether the matter relied on constituted a valid claim to the relief sought, was properly rejected.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 218.]

4. Pleading (§ 136*)—Refusal of Special Plea of Matter Allowable under General Issue.—A special plea, that plaintiff claiming to be surety on a note was entitled to recover only such costs of collection as he in fact paid and was regularly bound to pay his own attorney, was properly disallowed, since such defense could have been made under the general issue thereon.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 259.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

5. Bills and Notes (§ 126*)—Indorser Paying Note May Recover Costs or Attorney's Fees.—Where the makers and indorsers of a note agreed therein to pay costs of collection and 10 per cent attorney's fees in case of nonpayment at maturity, although plaintiff, indorser, may not have paid the payees or indorsees any costs of the collection or attorney's fees because of default of makers or other prior parties, if the plaintiff after payment had to place the note with an attorney for collection, he was entitled to recover of the makers and prior parties the amount of such expense of costs of collection or attorney's fees.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 467.]

6. Evidence (§ 423 (6)*)—Parol Evidence Admissible to Show Relation of Parties to Note.—As between parties liable upon a note, having knowledge of their true relations one to another, parol evidence is admissible to show the true relationship, regardless of where the signatures appear on the note, whether as makers or indorsers, and under Negotiable Instruments Law, § 2841a, subsec. 68, indorsers are liable *prima facie* in the order of their indorsement, but evidence is admissible to show that as between or among themselves they have agreed otherwise.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 468; 2 Va.-W. Va. Enc. Dig. 474.]

7. Bills and Notes (§ 473*)—Sufficiency of Plea in Action by Indorser.—A plea by defendants, sued on a note by an indorser, that they were also only indorsers, was fatally defective because not containing the further allegation that plaintiff and defendants had agreed at the time of the execution and indorsement of the note that they should be jointly liable as sureties for the true makers, or allegations to such effect.

8. Pleading (§ 8 (5)*)—Successive Liability of Indorsers.—A plea by defendants, sued as makers of a note, that the plaintiff, an indorser, was only entitled to recover the "pro rata amount due by these defendants as indorsers, because each indorser assumes the same liability as every other," is a mere conclusion of law and erroneous; in view of Code 1904, § 2841a, subsec. 68, under which the liability of indorsers, in the absence of special agreement, is successive and not joint.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 468; 11 Va.-W. Va. Enc. Dig. 218.]

9. Judgment (§ 273 (1)*)—Entry Nunc Pro Tunc Not Permitted on Negligence or Misapprehension of Parties.—Where a final judgment ought to be, but owing to the court's delay has not been, entered, the court, if it has such power, uses the papers, proceedings, and evidence in the case as the same existed at the time to which the

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

order or decree is proposed to relate back, as the basis of its action and enters the decree to which the party was then entitled, but may not do so where the delay was imputable to any negligence or even misapprehension of the parties.

[Ed. Note.—For other cases, see 8 Va.-W. Va. Enc. Dig. 313.]

10. Judgment (§ 273 (1)*)—Motions (§ 56 (2)*)—Judgment or Orders Nunc Pro Tunc.—The power to affect the operation of a judgment or order, or change its import by a judgment or order nunc pro tunc, should be exercised with caution and circumspection.

[Ed. Note.—For other cases, see 8 Va.-W. Va. Enc. Dig. 313.]

11. Judgment (§ 273 (4)*)—Right to Enter Judgment or Order Nunc Pro Tunc.—In view of Code 1904, § 3507, providing that the lien of a judgment shall in no case relate back to a time prior to that on or at which the judgment was rendered, the courts do not possess the power to enter nunc pro tunc judgments in cases where suitors have done all in their power to have the cause decided, but owing to the delay of the court no final judgment has been entered, but only in cases where, from accident or mistake of the court officers, the judgment or order entered had never been entered upon the records.

[Ed. Note.—For other cases, see 8 Va.-W. Va. Enc. Dig. 313; 8 Va.-W. Va. Enc. Dig. 361.]

12. Appeal and Error (§ 1177 (2)*)—On Erroneous Entry of Judgment Nunc Pro Tunc New Trial Granted in Supreme Court.—Where the only error in the record of a case was the entry of a nunc pro tunc judgment, which might be cured by the entry of the same judgment by Supreme Court to take effect as of the date in fact entered by the court below, yet, where plaintiffs in error claim to have several substantial defenses attempted to be set up by rejected special pleas, the defects in which are formal, a new trial should be granted.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 588.]

13. Bills and Notes (§ 474*—Special Plea of Matter Which Might Be Set Up by General Denial.—In view of Code 1904, § 3299, relating to special pleas of set-off, the defense that the amount claimed by plaintiff, indorser of a note, as attorney's fees, is unreasonable in amount and unconscionable, can be made by special plea; although, the contract not being under seal, the matter could be set up by general denial.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 259.]

14. Bills and Notes (§ 474*—Sufficiency of Plea of Unconscionable Amount of Attorney's Fees.—A special plea, under Code 1904, § 3299, that amount claimed by plaintiff, indorser of a note, for attorney's fees, is unreasonable in amount and unconscionable, should al-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

lege the amount to the extent of which the defendant claims the same is unreasonable or unconscionable, and also the facts on which such claim is based with sufficient detail and certainty to apprise plaintiff and the court of the nature of the defense.

[Ed. Note.—For other cases, see 12 Va.-W. Va. Enc. Dig. 285.]

15. Bills and Notes (§ 537 (1)*)—Special Plea of Set-Off for Court Where Facts Are Admitted.—In an indorser's action upon a note, where defendants pleaded under Code 1904, § 3299, that the amount claimed for attorney's fees was unreasonable and unconscionable, if the pleaded facts are admitted, the sufficiency of the defense, including the determination of the amount that should be recovered, is for the determination of the judge, while, if the issue upon the plea be one of fact, it must be tried by the jury under proper court instructions, unless all matters of fact and law are submitted for the judge's decision under the statute by consent of the parties.

16. Bills and Notes (§ 534*)—Reasonable Amount of Attorney's Fees.—Upon the issue being made as to the amount recoverable under the attorney's fee provision of a note sued upon by indorser, the judge should allow only a reasonable amount considering the attorney's services actually performed in collecting the debt, in view of the customary charges of the profession in the locality for such services, not exceeding the maximum stipulated in the obligation, and, where the services of an attorney were not in fact employed by the holder, no attorney's fees should be allowed.

[Ed. Note.—For other cases, see 17 Va.-W. Va. Enc. Dig. 126. See also, 2 Va. Law Reg. (N. S.) 321—cited in principal case.]

17. Bills and Notes (§ 126*)—“Costs of Collection” Relate to Attorney's Fees, Not Costs of Action.—In a note providing that “the makers or indorsers * * * agreed to pay costs of collection, or ten per cent. attorney's fees in case payment shall not be made at maturity,” the words “costs of collection” do not refer to costs of suit, which are recoverable by law, but to the “attorney's fee” for services in making or attempting collection; such agreement being valid and enforceable to the extent of a reasonable attorney's fee, not exceeding the percentage named in the note.

[Ed. Note.—For other definitions, see Words and Phrases, Costs of Collection. For other cases, see 17 Va.-W. Va. Enc. Dig. 126, 127.]

Error to Circuit Court, Scott County.

Action by C. F. Hagan against R. W. Cox and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

W. S. Cox, of Gate City, for plaintiffs in error.

R. L. Pennington, of Bristol, for defendant in error.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.